87-358

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NO.

in the Supreme Court of the United States

OCTOBER TERM, 1987

EMANUEL BARSHOV
and
JAMES E. ROSS,

Petitioners

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER A DEFENDANT IS ENTITLED TO A NEW TRIAL WHERE THE PROSECUTOR ALLOWED TWO KEY GOVERNMENT WITNESSES TO TESTIFY FALSELY ABOUT THE LEADING ISSUE AT TRIAL.

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OPINION BELOW

Appendix A is the judgment of the Court of Appeals affirming the district court's Order, and Appendix B comprises the Orders of the district court denying the defendants' Motion for a New Trial.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on June 30, 1987. This Petition for Writ of Certiorari has been filed within 60 days of the denial of rehearing and on or before August 29, 1987, and is timely. Supreme Rules, 20.1. Jurisdiction is invoked pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States

No person shall . . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Emanuel Barshov and James E. Ross, Defendants, were indicted in the United States District Court for the Southern District of Florida on one count of conspiracy and twenty-three substantive counts for violations of the tax laws of the United States.

The government claimed, among other things, that Defendants, as general partners, knowingly purchased motion pictures for a limited partnership at tremendously inflated prices, and, therefore, knowingly raised the basis for depreciation and investment credit purposes.

The Defendants' partnership had purchased these motion pictures from a Seller, who had previously purchased them from a Producer. The Producer had transferred by written agreement all of the motion picture rights, theatrical and nontheatrical, to Seller. Simultaneously, Seller had transferred back to Producer by separate written agreement the nontheatrical rights (i.e., television, cassette, and non-theatrical rights), which are the

more valuable of the two. Pursuant to these two agreements of even date, $290,000 was ultimately paid by Seller for control of the theatrical rights only for the motion pictures.

The Seller then purportedly transferred by written agreement all of the rights, including the nontheatrical rights, to Defendants' limited partnership for about $2,000,000. This written agreement was admitted into evidence and included a warranty that all rights were transferred to the partnership. The Defendants were made aware of the existence of an agreement transferring all rights from Producer to Seller, but did not know how much Seller had paid. Defendants were not made aware of the existence of the separate agreement transferring back the nontheatrical rights.

Defendants were indicted around 1980, and during trial Defendants were always unaware of any information that Producer had retained the nontheatrical rights to the movies. They therefore thought that the limited partnership owned all the rights to the movies.

At trial, Seller testified that he had been the "true and rightful owner" of the motion pictures, including the nontheatrical rights, and that he had purchased all these rights for $290,000. He then testified that he sold all of the rights in the motion pictures to the limited partnership in accordance with his warranty for $2,000,000.

At trial, Producer testified that "the [theatrical and nontheatrical] rights were free and clear" for sale to the Defendants' partnership, and that the value of all of the motion picture rights was $290,000. No mention was made of the simultaneous separate agreement which transferred back the

nontheatrical rights. Defendants were convicted of inflating the purchase price of the motion pictures.

Subsequently, Defendants learned of the Producer's claim to the nontheatrical rights and the separate agreement by which Producer asserted full ownership thereto.

The limited partnership sued Seller for breach of warranty and fraud, and obtained a Default Final Judgment against him.

Defendants then filed a Motion for New Trial based on the new discovery of the Producer's claim to ownership of the nontheatrical rights and of the separate agreement. Defendants contended that the Producer's and Seller's testimonies that the lower purchase price was for all the rights were both false, and that the false testimony was material to establish the government's claim of inflated purchase prices. The district court entered an Order (setting an evidentiary hearing) which concluded that "[t]he evidence in this case showed that on June 28, 1973, [Producer] sold all the rights in certain films to...[Seller] who was an important government witness at the trial," and that all of the rights were then transferred by Seller to the limited partnership.

At the evidentiary hearing, the prosecutor admitted that he was aware at the time of trial that the Producer had reserved the nontheatrical rights.

Although the trial court recognized that the testimony of the Producer and Seller had been false, the trial court subsequently entered an Order Denying Motion for New Trial and an Order Denying Section 2255 Motion which (1) applied the standard that

the newly discovered evidence must be of a nature to "probably" produce acquittal; (2) concluded that the evidence was cumulative to impeachment, rather than material to the substantive evidence; and (3) found that the defendants lacked due diligence in discovering the newly discovered evidence prior to trial. Defendants appealed from these orders to the United States Court of Appeals for the Eleventh Circuit, which affirmed per curiam. *See Appendix*. Defendants now appeal to this Court for a writ of certiorari to the appellate court to review the fairness of the trial proceedings and the legal conclusions.

ARGUMENT

Generally, a motion for a new trial based on the ground of newly discovered evidence must meet the following requirements: (1) it must appear from the motion that the evidence relied on is and, in fact, newly discovered, that is, discovered after trial; (2) the motion must allege facts from which the court may confer that the failure to learn of the evidence was not due to lack of diligence on the part of the defendant; (3) the evidence relied on must be material to the issues involved, not merely cumulative or impeaching; and (4) the evidence must be such as, on a new trial, would "probably" produce an acquittal. *Federal Procedure, Lawyers Edition,Volume 9, Page 509, Section 22:981.*

However, where newly discovered evidence establishes that a key government witness has committed perjury with respect to a material issue, a special standard applies. *United States v. Hamilton*, 559 F.2d 1370, 1373 (5th Cir. 1977). Under this test, the party seeking a new trial must have been taken by surprise when false testimony was given and have been unable to meet it, and that the jury, without such false testimony, "might" have reached a different result. *Id. at n.6. See also United States v. Smith*, 433 F.2d 139,50-51 (5th Cir. 1970) (adopting standard based on *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928)).

Deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. *Giglio v. United States*, 405 U.S. 150, 153 (1972). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Although a finding of materiality of the evidence is required, a new trial is

required if "the false testimony could in any reasonable likelihood have affected the judgment of the jury...." Id. at 271; *Mooney v. Holohan*, 294 U.S. 103 (1935). *See generally, Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (discussing these rulings).

The district court departed from the accepted and usual course of judicial proceedings in its Order Denying Motion for a New Trial by sanctioning this false testimony. The order erred in three basic ways: (1) by applying the wrong standard that the newly discovered evidence must be of a nature to "probably" produce an acquittal; (2) by determining that the false testimony was cumulative and not material; and (3) by ruling that a lack of due diligence on the Defendants' part in discovering the separate agreement prior to trial denies them a new trial under the circumstances present here.

Because the district court concluded that the evidence established that all of the rights to the movies were transferred from the Producer to the Seller and to the limited partnership, and because the district court as well as the government now admits that this was not true, the evidence at trial was false. Additionally, since the prosecution was aware of the newly discovered evidence at the time of trial, and did not disclose it to defendants, it knew or should have known of the false testimony. Therefore, the special standard as set forth in *Larrison v. United States, supra*, i.e., the newly discovered evidence "might" produce an acquittal, is applicable. Consequently, the district court abused its discretion when it applied the "probability" standard in the Order Denying Motion for New Trial.

The district court abused its discretion in determining that the newly discovered evidence was cumulative because the Seller

"was cross-examined extensively and was impeached in some degree" on other matters. *See Appendix*. While the newly discovered evidence also attacks the credibility of the Seller because it establishes his trial testimony as false, it does more than that. The newly discovered evidence is substantive, material evidence in that it affirmatively establishes that the lower purchase price paid by the Seller to the Producer cannot fairly be compared to the higher purchase price paid by the limited partnership to the Seller. This is so because the limited partnership purchased all the rights, whereas the Seller purchased only the theatrical rights. Since the knowing inflation of the purchase prices was the leading issue in the case, the newly discovered evidence is material evidence, and not cumulative.

The district court abused its discretion in denying defendants a new trial on the ground that there was a failure of due diligence on the part of the Defendants to learn of the newly discovered evidence prior to trial. Before trial, and when the Producer testified at trial that all of the rights had been transferred, there was no reason for Defendants to question ownership of all the rights, since their understanding was that they did in fact own all the rights to the motion pictures. On the other hand, the prosecutor had an obligation to correct false testimony where he was or should have been aware of it. Under 28 USC Section 2255, where new evidence shows that perjured testimony was used at trial, and that the prosecutors had knowledge of the perjury, that should be sufficient to vacate the judgment and sentence. *Holt v. United States*, 303 F.2d 791, 794 (8th Cir.), *cert. denied*, 372 U.S. 970 (1972); *Enzor v. United States*, 296 F.2d 62, 63 (5th Cir. 1961). Therefore, the knowing or negligent use of perjured testimony by the prosecution on a material matter is alone sufficient to justify a new trial, without the need to

determine due diligence on the part of the defendants. *Compare Anderson v. United States*, 403 F.2d 451, 454 (7th Cir. 1968) (defendants only need to allege that they were unaware of the perjury at time of trial where prosecutor knew of perjury).

CONCLUSION

The prosecutor allowed perjured testimony to stand uncorrected on the leading issue at trial and the lower courts have sanctioned this. This behavior is a far departure from the accepted and usual course of judicial proceedings, and its sanction by the Court of Appeals calls for an exercise of this Court's power of supervision.

Respectfully submitted,

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BY: Nathan D. Clark
NATHAN D. CLARK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one (1) copy of the foregoing Petition for Writ of Certiorai to the United States Court of Appeals for the Eleventh Circuit filed on behalf of the Petitioners has been mailed to: MICHAEL L. PAUP, ESQUIRE AND DEBRA DAWSON, ESQUIRE, Department of Justice, Tax Division, Appellate Section, Washington, D.C. 20530; and one copy was mailed to SOLICITOR GENERAL, Department of Justice, Washington, D.C. 20530, this 28th day of August, 1987.

Nathan D Clark

NATHAN D. CLARK, ESQUIRE

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 86-5806 & 86-5876

D.C. Docket Nos. 81-128 & 85-8285

EMANUEL BARSHOV and JAMES E. ROSS,
Petitioners-Appellants,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(June 30, 1987)

Before TJOFLAT and VANCE, Circuit Judges, and ALLGOOD*, Senior District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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*Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Judgment Entered: June 30, 1987
For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED BY MANDATE: JUL 22 1987

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-128-Cr-Paine

UNITED STATES OF AMERICA)
v.)
EMANUEL BARSHOV and)
JAMES E. ROSS,)
)
Defendants.)
_____)

ORDER

The defendants, Emanuel Barshov and James E. Ross, have filed a motion for new trial under Rule 33 or 28 U.S.C. §2255. The thrust of the motion is for a vacature of their sentences and for a new trial based upon the ground of newly discovered evidence. The motion has been timely filed within the requirements of both Rule 33 and 28 U.S.C. §2255. While the motion is filed pursuant to both Rule 33 and Section 2255, it is noted that §2255 provides for an independent civil action. While no such action has been filed here, the Court will treat the motion under both Rule 33 and Section 2255 since the ground of newly discovered evidence may be asserted under either.

A motion for a new trial based on the ground of newly discovered evidence must meet the following requirements:

1. It must appear from the motion that the evidence relied on is, in fact, newly discovered, that is, discovered after trial.

2. The motion must allege facts from which the Court may infer that the failure to learn of the evidence was not due to lack of diligence on the part of the defendant.

3. The evidence relied on must be material to the issues involved, not merely cumulative or impeaching.

4. The evidence must be such as, on a new trial, would probably produce an acquittal. Federal Procedure Lawyers Edition, Vol. 9, p.509, §2255:981.

Evidence discovered after trial which discredits a witness, but does not directly contradict the government's case, is ordinarily not a ground for granting a new trial. However, a new trial will be awarded where such disclosure deals a severe enough blow to the credibility of a witness as to establish a significant chance to negate the conviction. *U.S. v.Fried*, 486 F.2d 201 (CA 2 1973).

An oral hearing on defendant's motion for new trial should be held where an affidavit infuses doubt into the finding of defendant's guilt. *Lyles v. United States*, 272 F.2d 910(CA 5 1959).

The evidence said to be newly discovered is a document, marked exhibit "B" to the defendants' motion. The document is a letter dated June 28, 1973 from Freedom U.S.A. Records, Inc. to Anglo EMI Film Distributors Ltd. It is asserted that the content of this letter was unknown to the defendants until December of 1983 (paragraph 3 B of defendants' motion) or about January, 1984. (Paragraph 2 of defendant's motion). Either of these dates are approximately a year, or a bit less, after the conviction of the defendants for conspiracy to inflate the purchase price of motion pictures so as to generate inflated and

false tax depreciation deductions as well as false statements on various tax returns.

The evidence in this case showed that on June 28, 1973, Anglo EMI Film Distributors Ltd. (EMI) sold all the rights in certain films to Freedom U.S.A. Records, Inc., a company owned by one Samuel Lang who was an important government witness at the trial. The document said to be newly discovered evidence, but allegedly not known to the defendants is dated the same date. It purportedly transfers back to EMI certain of the rights covered by the contract mentioned above. A third document dated June 29, 1973 is an agreement signed by Samuel Lang in which he warranted that all of the rights transferred to Pan Properties, Limited (PAN) which was an entity created by the defendants were owned by Freedom U.S.A. Records, Inc. whereas, in fact, some of these rights were not so owned because they had been transferred to EMI on the day just previous by the document constituting the newly discovered evidence. The government's evidence was that the selling price of the films sold to Freedom U.S.A. Records, Inc. (FREEDOM) was much less than the values assigned to these assets by PAN in establishing a basis for depreciation in the tax shelter device which was marketed to the limited partners. The fair market value of the property sold by FREEDOM to PAN was issue at the trial.

A representative of EMI testified at the trial that EMI was paid much less for the properties transferred from it to FREEDOM than the value placed on the property by PAN for purposes of establishing depreciation which would be available to the limited partners of PAN. It is asserted by the defendants that

because Barshov and Ross, acting for PAN, assumed that PAN had bought property worth far more than what was paid EMI. It is asserted that the jury which tried the issue of whether the value of the property was grossly inflated by the defendants was mislead. The position of the defendants is that they would probably have been acquitted had this newly discovered evidence been available to them. The defendants assert that they were deprived of the argument that the value of what they thought had been purchased by PAN was much greater than EMI received from FREEDOM so as to justify the value assigned for depreciation purposes by the limited partnership, PAN. The defendants assert that this evidence is not merely impeaching nor cumulative; that the purchase price was a leading issue in the case and that an evidentiary hearing is required to determine factual disputes as well as to determine whether the government was aware of the existence of this evidence and failed to make it available as Brady material.

The position of the government is that, insofar as the charge of failure to produce this Brady material is concerned, that it had no knowledge whatever of the existence of this allegedly newly discovered document at the trial, that its materiality or relevance has not been shown, that the document is, at the most, only impeaching, and that it is only cumulative. The government further asserts that had the newly discovered evidence been available to the defendants it would not have created a reasonable doubt as to their guilt.

It is the conclusion of the Court from the submissions of the parties that had the defendants been aware of the document

transferring rights back to EMI from FREEDOM immediately prior to the sale by FREEDOM of property rights to PAN, the same may have been offered into evidence and, in that event, would have been received as relevant.

However, Exhibit A to defendants' motion, the agreement between EMI and FREEDOM in paragraph 2.7 makes reference to monies payable by FREEDOM to EMI – and grants a security interest in certain of the property rights. Had the defendants had access to this document they would have had information from which they should have concluded that not all of the property rights were being transferred in spite of the "warranties" of Samuel Lang. The defendants assert through an affidavit by Oliver C. Murphy, Jr., an attorney who represented PAN that while the existence of Exhibit A of the motion for new trial was disclosed to him by Lang, he was not shown the original or a copy of the same nor was it otherwise available to him. The government asserts that this document was within the awareness of the defendants.

Rule 8 of the rules governing §2255 proceedings leaves to the judge's discretion the question of whether or not an evidentiary hearing is required. It is the view of the court that an evidentiary hearing may be helpful in determining the issue of whether the defendants failure to learn of the evidence was due to lack of diligence on their part as well as whether the evidence was merely cumulative and whether that on new trial the availability of this evidence to the defendant would probably produce an acquittal.

It is, therefore,

ORDERED and ADJUDGED that an evidentiary hearing is hereby scheduled before the Court at 10:00 A.M. on Friday, August 8, 1986, at West Palm Beach. One hour will be allowed the defendants and one hour to the government to be utilized for the presentation of their respective positions to the Court.

DONE and ORDERED at West Palm Beach, Florida this 23rd day of July, 1986.

James C. Paine
United States District Judge

cc: Jerrold L. Kluger, Esq.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-128-Cr-PAINE

UNITED STATES OF AMERICA,
v.
EMANUEL BARSHOV and
JAMES E. ROSS.
----------/

ORDER DENYING MOTION FOR NEW TRIAL

Before the court is the motion for new trial made by the defendants, Emanuel Barshov and James E. Ross, pursuant to Rule 33 of the Federal Rules of Criminal Procedure and 28 U.S.C. §2255, based upon the ground of newly discovered evidence (DE 216). On July 23, 1986 this court considered the defendants' Rule 33 motion, and entered an order (DE 236) which stated the burden of proof resting on defendants with respect to the motion and holding that an evidentiary hearing be set to take evidence and hear argument on the same. The hearing, originally scheduled for August 8, 1986 actually occurred on August 18, 1986 after postponement. Evidence was presented at this hearing and oral argument of counsel for the parties was received. Thereafter, pursuant to the court's directions, written submissions by counsel were made to the court and affidavits of witnesses not present, as well as one witness who was present, were received including supplements to the motion for new trial.

The order of this court entered July 23, 1986 (DE 236) is referred to and made a part of the instant order as a predicate for the ruling to be made herewith.

The evidence said to be newly discovered is a document, marked exhibit "B" to the motion of the defendants. That document is a letter dated June 28, 1973 from Freedom U.S.A. Records, Inc. to Anglo EMI Film Distributors, Ltd. It is asserted that the content of this letter was unknown to the defendants until December of 1983 (par. 3.b. of defendants' motion) or about January 1984 (par. 2. of defendants' motion). Had the parties been aware of the document transferring rights back to Anglo EMI Film Distributors from Lang prior to the sale of the defendants limited partnership, the same may have been offered in evidence and, in that event, would probably have been received as relevant evidence under Fed. R. Evid. 401.

However, a review of all of the evidence offered together with this newly discovered document does not lead to the conclusion that the result would have been different. The witness, Lang, was cross-examined extensively and was impeached in some degree. His business methods and tax law compliance was put in issue in questions on cross examination. Whatever may have been accomplished, had the defendants known of the document now offered as newly discovered evidence, must be regarded as cumulative to the evidence which was available to the trial jury.

Further, exhibit "C" to the defendants' motion for relief shows that 100 percent of the first $200,000 of non-theatrical earnings on motion pictures was to be paid to Freedom. So, defendants had information that Freedom had a claim to some of

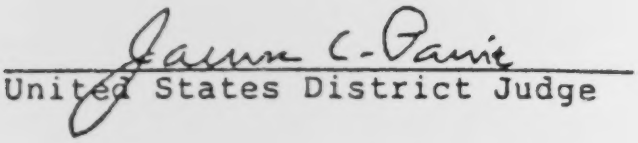
the rights which were supposedly transferred, without reservation, by Anglo-EMI to Pan. The conclusion which exhibit "B" to defendants' motion would have supported was not, therefore, unknown to the petitioners although the details of the agreement between EMI and Lang were not made available by the use of exhibit "B" in evidence. This document was only cumulative, then, to the information available through the content of exhibit "C".

The testimony of the witness, Oliver C. Murray, Jr., is not entirely credible in that it is inconsistent in some respects, with his affidavit (DE 225) filed subsequent to the evidentiary hearing.

It is evident from the whole of the record made relative to the motion for a new trial that the defendants were on notice of the existence of the newly discovered evidence prior to trial. There was a failure of due diligence on the part of the defendants. Had the so-called newly discovered evidence been used it would have been either cumulative or perhaps useful in impeachment. The court is unable to conclude that the introduction of the document in question would have resulted in a different verdict. Having considered defendants' motion for a new trial and the evidence relative thereto, it is

ORDERED and ADJUDGED that the motion of the defendants for new trial pursuant to Rule 33 of the Fed. R. Crim. P. and under 28 U.S.C. §2255 must be and the same is hereby DENIED.

DONE and ORDERED in West Palm Beach, Florida, this 25th day of September 1986.



Copies:

Jerrold L. Kluger, AUSA
Nathan D. Clark, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 85-8285-Civ-Paine
81-128-Cr-PAINE

UNITED STATES OF AMERICA)
Respondent))
EMANUEL BARSHOV and)
JAMES E. ROSS,)
Movants.)
)

ORDER DENYING SECTION 2255 MOTION

Before the Court is the motion of Emanuel Barshov and James E. Ross for relief pursuant to 28 U.S.C. §2255. This prayer for relief was included in a motion for new trial in the criminal case of *United States of America v. Emanual Barshov and James E. Ross*, Case No. 81-128-Cr-Paine. An order was entered denying the motion for new trial on September 25, 1986. The §2255 motion together with all files, records, transcripts and correspondence relating to the judgment under attack have been examined in accordance with Rule 4 of the rules governing §2255 proceedings. For the reasons stated in the order denying motion for new trial in the criminal case, the relief requested pursuant to §2255 must be denied. By reference, the order denying motion for new trial in Case No. 81-128-Cr-Paine, is incorporated herein. It is,

ORDERED and ADJUDGED that the §2255 petition be and the same is hereby denied. The Clerk is directed to close this file.

BEST AVAILABLE COPY

DONE and ORDERED at West Palm Beach, Florida this 15th day of October, 1986.

James C. Paine
United States District Judge

cc: Nathan D. Clark, Esq.
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